

NOT FOR PUBLICATION – For Upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 1984-104
)	
GOVERNMENT OF THE VIRGIN ISLANDS,)	
)	
Defendant.)	
)	

ATTORNEYS:

Donald G. Frankel, Esq.
U.S. Department of Justice
Washington, D.C.
For the plaintiff,

Michael Law, Esq.
Assistant Attorney General
St. Croix, U.S.V.I.
For the defendant.

MEMORANDUM

On September 27, 2001, this Court ordered the Government of the Virgin Islands ["government"] to appear before it on Thursday, October 18, 2000 "to show cause why it should not be held in contempt for its continued and flagrant failure to comply with the Amended Consent Decree and this Court's orders." (See Order at 6 (filed September 27, 2001).) The Court further ordered the Government of the Virgin Islands "to bring with it those persons responsible for and familiar with the status of its compliance, including, but not limited to, Governor Charles W. Turnbull." (See *id.* at 6-7.)

Just three days before the hearing, on October 15, 2001, the Government of the Virgin Islands moved for a modification of the show cause order to allow the Governor to appear at the hearing voluntarily and not pursuant to court order. In support of its motion, the Government of the Virgin Islands makes arguments based primarily on a purported executive privilege and claimed violation of constitutional separation of powers. The Government of the Virgin Islands further argues that this Court cannot compel the Governor to testify about discretionary acts and that there is no need to require the Governor to testify about nondiscretionary acts when other officials can testify to the same information. (See Mem. Supp. Mot. for Modification at 6-7.) For the reasons stated, the government's motion will be denied.

The government's assertions simply ignore the fact that the Governor of the Virgin Islands is not just a witness; he and his office are parties to this action brought by the United States in a federal court to enforce violations of federal law. By signing the initial and amended consent decrees, the Chief Executive of the Virgin Islands voluntarily submitted his office and the Government of the Virgin Islands to the authority and jurisdiction of this Court and its orders to enforce the obligations assumed by the Government of the Virgin Islands.

The Governor has not been called to testify regarding

policy-making decisions, deliberations, or "discretionary acts." He has been called to account for his failure, as chief executive of a territorial government subject to this Court's orders and the amended consent decree, to comply with those orders and with the terms of a court decree to which the Governor voluntarily assented. There is simply no authority for the proposition that the Court may not require the appearance and/or testimony of a Governor who, by signing a consent decree, willingly and voluntarily placed his government under the jurisdiction and authority of this Court. Just because other officials -- whether directly responsible to the Governor (such as the Director of the Office of Management and Budget) or fulfilling statutory positions (such as Commissioners) -- are separately answerable to the Court, it does not follow that the Governor, as the chief executive of those officials, is not also answerable to this Court's orders.

Even if I were to read the government's argument as a proper invocation of an executive privilege, Federal Rule of Evidence 501 provides guidance whether the Governor of the Virgin Islands, as a signatory of the Amended Consent Decree, may assert an "executive privilege" in this Court to avoid appearing and/or testifying in this case. Rule 501 states, in relevant part, that "the privilege of a witness . . . shall be governed by the

principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." As recognized by federal courts under Rule 501, the common law of executive privilege encompasses, *inter alia*, a privilege that would allow the Governor or his administrative heads to refuse to produce "official information, such as inter- and intra- agency communications connected to policy-making and decisionmaking functions." *Association for Women in Science v. Califano*, 566 F.2d 339, 343 (D.C. App. 1977). Executive privilege would also apply to protect the government from revealing predecisional and deliberative official information, the primary aim in that instance being to "prevent injury to the quality of agency decisions." See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). More generally, a federal court will recognize a privilege when permitting a refusal to testify would serve "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

It should be patently obvious to all that the public good is at the very heart of the action of the United States in bringing this case some seventeen years ago, the initial and amended consent decrees signed by the United States and the Government of the Virgin Islands and approved by this Court, and this Court's

efforts to enforce the consent decree, including the forthcoming contempt hearing. To his credit the Governor does not, nor could he, even suggest that his silence on this matter of extreme importance to the public safety and well-being could serve any public good, let alone transcend the truth-seeking efforts of this Court.

Further, the Governor does not assert a privilege to protect "deliberative official information" or communications regarding "policy-making or decisionmaking functions." Instead, the Government of the Virgin Islands argues that this Court cannot compel the Governor to testify about discretionary acts and that there is no need to require the Governor to testify about nondiscretionary acts when other officials can testify to the same information. It also claims a violation of constitutional separation of powers. In support of its motion, the government cites cases that have no bearing on the question whether this Court can require the appearance and testimony of an executive who has voluntarily placed himself under the full power of the Court by agreeing to the terms of a consent decree. *See, e.g., Kirk v. Baker*, 229 So. 2d 250, 252 (Fla. 1969) (decided under state law and not as a matter of federal common law under Rule 501). In *Kirk*, the Florida Supreme Court merely held that a state judge who is subject to removal by the state governor could

not hold his boss, the governor, in contempt. The Florida court's ruling had nothing to do with a contempt proceeding in a federal court before a federal judge at which a local executive officer is called to defend his actions in a case involving the enforcement of federal law.¹

Finally, the Separation of Powers Doctrine is not involved in this proceeding. This Court is not inquiring into the confidential or policymaking affairs of the executive branch of the local government. Rather, this Court is enforcing its right to hold persons who are subject to its jurisdiction accountable to validly issued court orders and consent decree. The Court is

¹ The other cases cited as "precedent" by the Government of the Virgin Islands are equally unavailing, as not one addresses the power of a court to call an executive to testify in a contempt hearing for failure to comply with the court's order. See *Halderman v. Pinehurst State Sch. & Hosp.*, 96 F.R.D. 60 (E.D. Pa. 1982) (hearing master could not compel the testimony of the head of an agency without first certifying that the information sought was necessary and relevant and not equally available from lower-ranking officials); *Wirtz v. Local 30, Int'l Union of Operating Eng'rs*, 34 F.R.D. 13 (S.D.N.Y. 1963) (union failed to establish that orally deposing the Secretary of Labor was necessary in order to determine whether there was a finding of probable cause); *Monti v. State*, 563 A.2d 629 (Vt. 1989) (writ of mandamus granted and matter remanded for trial court to determine whether the governor should be forced to provide an oral deposition in a wrongful discharge action brought by former state employee; executive privilege expressly not addressed); *Ellingson & Assoc., Inc. v. Keefe*, 396 N.W. 2d 694 (Minn. Ct. App. 1986) (state trial court could not require oral deposition of agency head during routine pre-trial discovery in action brought by private litigant); *New Jersey Turnpike Auth. v. Sisselman*, 255 A.2d 810 (N.J. App. Div. 1969) (in condemnation proceedings, private litigants could not orally depose three Turnpike Authority commissioners to probe their mental processes); see also *Thompson v. The German Valley Railroad*, 22 N.J. Eq. 111, 1871 WL 6722 (N.J. Ch. 1871) (holding that the governor could not be ordered to testify regarding his reasons for not signing a bill, but could be called to testify regarding the facts surrounding the date he received the bill; the question whether the court could order the governor to appear and testify for contempt proceedings was expressly not addressed).

also, of course, exercising here the public's "right to every man's evidence." *See United States v. Bryan*, 339 U.S. 323, 331 (1950). Accordingly, the government's motion will be denied.

Having ruled that the Governor of the Virgin Islands is subject to the Court's authority in this case, I am also mindful of incidents over the last couple of days involving biological threats in the Territory, whether criminal or terrorist based. Accordingly, the Court will accommodate Governor Turnbull's schedule and will not require him to attend the entire hearing tomorrow after he has made his presentation. Whether or not present for the entire hearing, however, the Governor remains subject to whatever rulings emanate from this Court's rule to show cause.

ENTERED this 17th day of October, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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For the defendant.

ORDER

For the reasons stated in the accompanying Memorandum of even date, it is hereby

ORDERED that the Government of the Virgin Islands' motion for modification of the Court's order of September 27, 2001 is **DENIED.**

ENTERED this 17th day of October, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

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